IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:21-CV-493-RJC-DCK

JERRY GREEN and LINDA PETROU,
Plaintiffs,

v.

KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina Board of Elections,
Defendant.

Case No. 3:21-CV-493

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

Plaintiffs allege that North Carolina, under Director Bell's leadership, is falling short of its federally mandated duty to maintain accurate voter rolls. That allegation is serious: Compared to other States, North Carolina is one of the few States whose rolls have become *more* inflated in recent years. This litigation, then, will turn on what procedures North Carolina uses to remove ineligible voters, whether those procedures are sufficient, and whether those procedures are consistently followed.

Movants' concerns lie elsewhere. As two groups who work to increase the registration of certain voters, Movants' only interest in this case is their concern that, *if* Plaintiffs prove that North Carolina is violating federal law, then the *remedy* for that violation might be so onerous that it will illegally sweep in eligible voters. Movants express no interest in defending North Carolina's existing practices (an interest that Director Bell thoroughly and adequately represents), or in keeping voters on the rolls who should be

removed (an interest that would violate federal law). Their interests go solely to the remedial stage of this litigation.

This Court should deny Movants' requests for intervention. Their requests are premature at this stage, before liability has been determined or any remedy has been proposed. And at any stage, Movants' interest in preventing an overbroad remedy is adequately represented by Director Bell and her attorneys from the state attorney general's office—officers who are required by law to defend *all* voters in North Carolina, who strongly resist Plaintiffs' lawsuit, and who have already filed a comprehensive motion to dismiss. For similar reasons, Movants' participation at this stage will needlessly increase the complexity of this litigation without any corresponding benefits. Movants have no factual expertise about North Carolina's list-maintenance procedures, and their legal expertise can be adequately expressed in amicus briefs. The Court should deny their motion.

I. The motion to intervene is premature.

Movants raise only one interest in this lawsuit: their concern that, if Plaintiffs prove that North Carolina is violating federal law, then the remedy for that violation will be overbroad. That overbreadth, they argue, would cause eligible voters to be illegally removed and cause Movants to spend resources reregistering them. By Movants' admission, this interest is highly contingent:

1. Movants' interest is tied to the remedial stage of this case, not liability. *E.g.*, Mot. (Doc. 16) 4 (opposing "the relief Plaintiffs seek"); *id.* at 1 (expressing concern about "canceled" registrations "as a result" of a

judgment for Plaintiffs); *id.* at 8 (tying their interest to the "outcome of any settlement or trial"); *id.* at 3 (expressing concern with "list maintenance strategies" that the court might "order as relief").

2. Movants' interest will not ripen unless this Court first rules for Plaintiffs on liability. *E.g.*, *id.* at 6 ("if granted"); *id.* at 8 ("[s]hould Plaintiffs obtain relief").

3. Movants' interest will not occur unless North Carolina's violations are remedied with relief that is unlawfully overbroad. *E.g.*, Mot. 7 (tying their interest to relief that "would result in eligible voters' registrations" being cancelled); *id.* at 4 (expressing concern over "unnecessary" relief); *id.* at 3 (expressing concern over "aggressive—and potentially unlawful" relief); *id.* at 7 (tying their interest to "unnecessary, improper, or unlawful" relief).

Given these contingencies, Movants' request for intervention is premature. It presupposes events that have not yet occurred, including a determination that North Carolina violated federal law (after motions practice, discovery, and potentially a trial); a determination that the violations require North Carolina to adopt new procedures (rather than following her existing procedures); and a proposed remedy that would require North Carolina to adopt unlawful, overbroad list-maintenance procedures.

This case thus resembles *United States v. Michigan*, where the movants tried to intervene "to protect their divergent interests '*in the event*'" the plaintiffs won on liability. 424 F.3d 438, 444 (6th Cir. 2005). Those interests, the Sixth Circuit explained, "seem more concerned about what will transpire *in the future* should the district court determine" that the plaintiffs are correct on the merits. *Id.* "While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court." *Id.* Intervention would thus "prematurely seek

to inject [remedial] issues that are not yet before the [district] court," "complicate the case," and "prejudice[] the original parties." *Id.* at 444-45. And to the extent the movants wanted to make arguments about liability, they "failed to articulate why the State['s] legal representation concerning this issue is inadequate." *Id.* at 444. So too here.

Because Movants' interests are contingent and premature, this Court should not grant intervention at this stage. The Court should simply deny the motion to intervene without prejudice, note Movants' remedial concerns, and state that "[s]hould the litigation proceed that far, the proposed intervenors may renew their motion." *Id.* at 446. Alternatively, the Court could grant the motion to intervene "for the limited purpose" of allowing Movants to participate at the remedial stage of this case, should it get that far. *Baynes v. Hanson*, 2009 WL 2255517, at *1 (W.D.N.C. July 28) (Conrad, J.). Movants could still participate at the liability stage as amici.

Movants raise the prospect that Director Bell will enter a "settlement," Mot. 8, but the prospects of a settlement (in a case that Director Bell is fiercely opposing and trying to dismiss) is speculative and remote. And Movants would have no right to "block" a settlement anyway, even if they intervened. *Hewett v. City of King*, 2013 WL 12320076, at *3 (M.D.N.C. Sept. 23) (citing *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013)). Again, Movants' focus on a potential settlement only further highlights their exclusive focus on the remedies. Until a remedial question is actually before the Court, it should deny Movants' request as premature.

II. Movants are not entitled to intervention as of right.

Intervention as of right has four requirements, *see* Fed. R. App. P. 24(a)(2), and a movant's "failure to meet any one" of them "will preclude intervention," *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 927 (4th Cir. 2021) (en banc), *cert. granted*, 2021 WL 5498793 (U.S. Nov. 24). Thus, Movants cannot intervene unless they articulate an "interest sufficient to merit intervention" in this case and prove that no existing party will "adequately represent [that] interest." *Virginia. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). In this Circuit, a movant bears the burden to "mount a strong showing of inadequacy." *Stuart*, 706 F.3d at 352.

While inadequacy is often a low bar, a "presumption of adequacy" arises when a proposed intervenor shares the "same ultimate objective as a party to the suit." *N.C. NAACP*, 999 F.3d at 950; *Westinghouse Elec. Corp.*, 542 F.2d at 216. And a "government defendant, given its 'basic duty to represent the public interest,' is a presumptively adequate defender" of challenged policies. *N.C. NAACP*, 999 F.3d at 932. Indeed, "Governmental entities are entitled to [a] heightened presumption of adequacy"; they are "uniquely well-situated" to defend state laws and policies "given their ability to speak in a representative capacity and their 'familiarity with the matters of public concern that lead to the statute's passage in the first place.'" *Id.* As one of Movants has successfully argued before, "When the existing party is a government agency, 'a very strong showing of inadequacy is needed to warrant intervention.'" *Democracy N.C. v. N.C. State Bd. of Elections*, Doc. 24 at 14, No. 20-cv-457 (M.D.N.C. June 12, 2020) (League of Women

Voters of North Carolina's opposition to motion to intervene); *see Democracy N.C. v. N.C. State Bd. of Elections*, 2020 WL 6591397, at *1 (M.D.N.C. June 24) (finding adequate representation and denying intervention as of right). This presumption of adequacy can only be rebutted by a persuasive showing of "adversity of interest, collusion, or non-feasance." *CX Reinsurance Co. Ltd. v. Leader Realty Co.*, 319 F.R.D. 487, 489 (D. Md. 2017); *see Westinghouse Elec. Corp.*, 542 F.2d at 216.

The presumption of adequacy applies here. Director Bell and Movants have the "same ultimate objective" in this case: maintaining the status quo by defending North Carolina's existing list-maintenance practices and defeating Plaintiffs' lawsuit. *Stuart,* 706 F.3d at 352; *U.S. Commodity Futures Trading Comm'n v. Hanson*, No. 3:09-cv-335, 2009 WL 2590208, at *1 (W.D.N.C. Aug. 19, 2009) (Conrad, J.). Director Bell and Movants also agree that this case should be dismissed, and they raise the same grounds for dismissal. *Compare* MTD (Doc. 20) (moving to dismiss for lack of standing and failure to state a claim); *with* Proposed Answer (Doc. 15-1) (raising the same two defenses). Indeed, in the related *Judicial Watch* case, Director Bell convinced Magistrate Judge Keesler to recommend granting a motion to dismiss. *See Judicial Watch, Inc., v. North Carolina*, Doc. 61, No. 3:20-cv-211-RJC-DCK (W.D.N.C. Aug. 20, 2021).

That Director Bell is vigorously resisting this lawsuit should not be surprising. As the official who designs, administers, and oversees the State's list-maintenance policies, she has every incentive to defend those policies and their implementation against legal challenge. 52 U.S.C. §20509; N.C. Gen. Stat. §163-27(d). So does her counsel, the

North Carolina Attorney General, "who, under North Carolina law, is charged with the duty to represent the State" and its interests. *N.C. State Conf. of NAACP v. Cooper*, 332 F.R.D. 161, 169 (M.D.N.C. 2019); *accord N.C. NAACP*, 999 F.3d at 937 ("The Attorney General has a statutory duty to represent and defend the State and its interests in this litigation."). Ultimately, when a "'governmental official ... is legally required to represent' the state's interest – as is the Attorney General here – then it is 'reasonable, fair and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation and put the intervenor to a heightened burden' to overcome it." *N.C. NAACP*, 999 F.3d at 933 (quoting *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 810 (7th Cir. 2019)).

Movants have not rebutted the heightened presumption that Director Bell adequately represents them—in fact, they don't even *try*. Movants make no attempt to argue collusion, adversity, or failure of duty; and any attempt to do so for the first time in their reply brief should be rejected. An "'undifferentiated, generalized interest in the outcome of an ongoing action'" is not sufficient to overcome the presumption of adequacy. *Ohio Valley Env't Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 19 (S.D. W. Va. 2015). Neither is having differences of opinion about proper policies, "differences over strategy," or an "alleged lack of vigor" on the State's part. *N.C. NAACP*, 999 F.3d at 930-36. Even if Director Bell someday decides to settle this case, she would be representing the interests of *all* voters, including Movants and their members. Movants cannot

intervene "'[s]imply because [they] would have made a different [litigation] decision.'" *Id.* at 936.

Nor have Movants argued—and "there [is] no record evidence suggesting"—that the State "has abdicated [its] responsibility to defend the law." *Id.* at 920. Notably, Director Bell has already moved to dismiss this entire case. *See Jordan v. Mich. Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000) ("[W]e need only peruse [the existing party's] brief … to appreciate the thoroughness of [the existing] representation."). Movants do "not identify a single argument that [they] would have made" differently, or "explain how [Defendant's] representation has been lacking in vigor." *Id.* Like the District of Montana was last year, this Court should be "skeptical that the [League of Women Voters] will present arguments in support of the [challenged policies] different than those asserted by the existing parties." *Donald J. Trump for President, Inc., v. Bullock*, No. 20-cv-66, 2020 WL 5517169, at *2 (D. Mont. Sept. 14, 2020).

Even if having unique interests could overcome the presumption of adequacy, *but see Stuart,* 706 F.3d at 352, Movants have not identified any unique interests. Movants' only asserted interest is their fear that, unless they intervene, Director Bell will unlawfully remove eligible voters from the rolls—either by agreeing to an overbroad settlement with Plaintiffs, or by receiving an overbroad injunction from this Court. But aside from being wholly speculative, Movants' interest in avoiding overbroad relief is adequately represented by *every* actor in this case. Plaintiffs wants North Carolina to follow its *existing* duty to remove *ineligible* voters from the rolls; Plaintiffs do not want a

settlement that requires North Carolina to remove, intentionally or unintentionally, eligible voters. Nor would this Court enter such an overbroad, unlawful injunction.

Director Bell, too, adequately represents Movants' interest in resisting overbroad relief that removes eligible voters. In addition to her state-law duty to represent all voters, Director Bell has a federal-law duty to maximize the number of eligible voters on the rolls. *See* 52 U.S.C. §20501(b). Director Bell pointed this out on in her motion to dismiss, stressing the need to "balance" the State's responsibilities to maintain the voter rolls without removing "eligible voters." MTD 20; *see also id.* at 9 (insisting that North Carolina "compli[es] with the NVRA's prohibition against removing voters without confirming a voter has moved"). In short, Movants' concerns "ha[ve] already been raised by [Director Bell]," and this Court will also ensure that they "be taken into account." *Bradley v. Milliken*, 828 F.2d 1186, 1193 (6th Cir. 1987). Because Movants cannot "establish that [their] interest can only be protected through intervening," this Court should deny intervention. *Id.*

The Central District of California reached the same conclusion in *Judicial Watch, Inc. v. Logan*, another case where plaintiffs challenged a State's list-maintenance policies and where several voter-registration groups tried to intervene. Doc. 76, No. 2:17-cv-8948 (C.D. Cal. July 12, 2018), bit.ly/2HnM1mX. There, too, the movants argued that, if California was held liable for failing to remove ineligible voters, then the resulting relief could result in the removal of "eligible voters." *Id.* at 2. But it is "purely speculative," the district court explained, "that eligible voters would be injured by ordering

compliance with the NVRA." *Id.* at 4. "Plaintiffs," after all, only "request that Defendant[] reasonably attempt to remove *ineligible* voters from the voter rolls," and the movants "will not be harmed if ineligible voters are removed." *Id.* at 2-3. Even if the movants' concern weren't speculative, the court continued, the defendants were "government officials charged with enforcing state election laws and promoting voter registration to eligible voters." *Id.* at 3. "They share the same interest as [movants] in protecting eligible voters' right to vote," and they "specifically stated that they intend to represent and defend [that] interest." *Id.* The movants thus failed to make the "compelling showing" they needed to overcome "the presumption that Defendants will adequately represent the citizens of California." *Id.* This reasoning is persuasive and should be followed in this virtually identical case.

III. Movants should be denied permissive intervention.

This Court should also deny permissive intervention. Though Rule 24(b) lists a few factors that must be considered, this Court "enjoys very broad discretion" in denying permissive intervention and "can consider almost any factor rationally relevant." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999); *accord Michigan*, 424 F.3d at 445 (explaining that a district court can consider the factors in Rule 24(b) and "any other relevant factors").

This Court should deny permissive intervention for largely the same reasons outlined above. As explained, Movants' interests are speculative, remote, and already well-represented by Director Bell. Adding proposed intervenors would thus "result[] in

inefficiencies and undue delay." *Democracy N.C.*, 2020 WL 6591397, at *2. When "intervention as of right is decided based on the government's adequate representation," as it should be here, "the case for permissive intervention diminishes, or disappears entirely." *Me. Republican Party v. Dunlap*, No. 1:18-cv-00179, 2018 WL 2248583, at *2 (D. Me. May 16, 2018). Director Bell's adequate representations means that Movants' "intervention would simply be piling onto the arguments advanced by the other parties to this litigation," *Donald J. Trump for President*, 2020 WL 5517169, at *2, and "is likely only to result in duplicative briefing adding a layer of unwarranted procedural complexity," *Ohio Valley Env't Coal., Inc.*, 313 F.R.D. at 31 (cleaned up).

The added burden of Movants' participation here is not small. Their participation is "likely to delay the main action as the case would expand to [three] defendants." *Logan*, *supra*, at 4. Worse, Movants' interests are "not dissimilar to the interests of any number of politically involved organizations in [North Carolina]." *Donald J. Trump for President*, 2020 WL 5517169, at *2. "If this Court were to permit [Movants] to intervene," it "would be hard pressed to deny future motions seeking intervention from any number of the hundreds of organizations who engage in such efforts from a partisan or nonpartisan standpoint." *Id.*

These concerns cannot be offset by any "expert testimony" that Movants might introduce about list maintenance. *Cf.* Mot. 11. For one, "defendant, as [North Carolina's Director of Elections], is undoubtedly familiar with [list maintenance]; indeed, defendant is the government party responsible for [overseeing this process]." *Prete v. Bradbury*,

438 F.3d 949, 958 (9th Cir. 2006). Movants offer no reason to believe that she "lacks comparable expertise." *Id.* For another, Movants "do[] not need party status to" offer their expertise. *Ohio Valley Env't Coal., Inc.*, 313 F.R.D. at 32. Indeed, Movants' "expertise may be effectively deployed through amicus briefs and by providing assistance to the state." *Daggett*, 172 F.3d at 113. Amicus status, which Plaintiffs do not oppose, may "be useful to the existing parties and this Court" and may "protect [Movants'] interests." *Ohio Valley Env't Coal.*, 313 F.R.D. at 31-32. Movants routinely file amicus briefs in election-law cases, and that role is most appropriate here as well.

At a minimum, if this Court grants intervention, then it should impose "reasonable limitations" on Movants' participation. *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001); *see Savannah Riverkeeper v. U.S. Army Corps of Engineers*, 2012 WL 13008326, at *2 (D.S.C. Aug. 14) ("In granting a party permissive intervention status, a District Court may condition that intervention on limiting the issues which may be raised by the intervening party and otherwise place reasonable restrictions on the scope of the litigation."); *Duke Energy Corp.*, 171 F. Supp. 2d at 565 ("'An intervention of right ... may be subject to appropriate conditions or restrictions.'"). Specifically, to avoid duplication, the Court should make Director Bell responsible for defending this case, bar Movants from filing a separate brief unless they first obtain leave of the Court, and bar Movants from repeating arguments that have already been briefed. *E.g.*, *Mi Familia Vota v. Hobbs*, 2021 WL 5217875, at *2 (D. Ariz. Oct. 4) (imposing this

condition). This condition would "be consistent with the fair, prompt conduct of this litigation." *Duke Energy Corp.*, 171 F. Supp. at 565.

CONCLUSION

The Court should deny Movants' motion to intervene.

Respectfully submitted,

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